

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,
Plaintiff,
v.
LONG VAN NGUYEN,
Defendant.

Case No. CR12-212RSL

ORDER GRANTING MOTION FOR RULE 15 DEPOSITIONS

I. INTRODUCTION

This matter comes before the Court on the government’s “Motion for Rule 15 Depositions” (Dkt. # 47). The government seeks to depose 10 witnesses in Vietnam to preserve their testimony for trial. Because defendant is in federal custody in SeaTac, Washington, the government also seeks to conduct these depositions without defendant’s presence. Although some witnesses have indicated a willingness to travel to the United States to testify at trial, others have informed the government that they are not willing to travel to testify. Having considered the parties’ memoranda and the remainder of the record, the Court GRANTS the government’s motion.

II. DISCUSSION

A. Background

In March 2012, the government began investigating defendant based on a tip from a confidential informant that defendant was planning to hire people to kill his common-law wife's relatives and his nephew in Vietnam. After learning of this alleged

1 scheme, Homeland Security Investigations (“HSI”), through its Country Attaché Office
2 in Ho Chi Minh City, Vietnam, informed the Vietnamese Ministry of Public Safety
3 (“MPS”) of defendant’s plan. MPS assigned an officer to investigate the murder plot.
4 MPS also assigned an undercover agent to pose as a hired assassin. During MPS’s
5 investigation, defendant’s nephew in Vietnam took the MPS undercover agent to the
6 houses of the intended targets.

7 Defendant was arrested in July 2012, near Tacoma, Washington, after discussing
8 his plans with an undercover HSI agent in Washington. He is charged with conspiracy
9 to kill persons in a foreign country in violation of 18 U.S.C. § 956(a)(1) and solicitation
10 to commit a crime of violence in violation of 18 U.S.C. § 373.

10 **B. Analysis**

11 **1. Depositions in a Criminal Case**

12 Rule 15 of the Federal Rules of Criminal Procedure (“Rule 15”) authorizes the
13 trial court to grant a motion for depositions to preserve testimony for trial in
14 “exceptional circumstances and in the interest of justice.” Fed. R. Crim. P. 15(a)(1).
15 “The district court retains broad discretion in granting a Rule 15(a) motion, and
16 considers the particular circumstances of each case to determine whether the
17 ‘exceptional circumstances’ requirement has been satisfied.” United States v. Omene,
18 143 F.3d 1167, 1170 (9th Cir. 1998) (quoting United States v. Farfan-Carreon, 935 F.2d
19 678, 679 (5th Cir. 1991)).

20 In his response to the government’s motion, defendant relies too heavily on the
21 factors lauded by the Ninth Circuit in United States v. Zuno-Arce, 44 F.3d 1420 (9th
22 Cir. 1995). Dkt. # 48 at 2-7. In Zuno-Arce, the Ninth Circuit upheld the district court’s
23 denial of defendant’s motion to take depositions in Mexico. Id. at 1424-25. The Ninth
24 Circuit praised the district court’s consideration of (1) the unavailability of the witnesses
25 and the good faith efforts to obtain the witnesses’ presence at trial, (2) whether the

1 movant established that the testimony would be favorable, and (3) whether the
 2 deponents would be available and willing to be deposed. Id. The court, however, did
 3 not create a formal test. Defendant argues that the government must establish that all of
 4 these factors weigh in favor of taking the deposition. Dkt. # 48 at 2.

5 Contrary to defendant's assertion, Rule 15(a) does not require a showing that the
 6 witness is unavailable for trial or that the evidence is material or favorable. Omene, 143
 7 F.3d at 1170. The government must establish a witness's unavailability before a party
 8 may use the depositions at trial, not before the party may depose a witness. Id. "Rule
 9 15(a) only requires that the trial court find that due to exceptional circumstances it is in
 10 the interest of justice that the testimony of a prospective witness be taken and preserved
 11 for possible use at trial." Id.

12 Having considered the parties' memoranda and the remainder of the record, the
 13 Court finds that exceptional circumstances exist under Rule 15. Although five of the
 14 witnesses identified by the government are currently willing to travel and testify at trial
 15 in October 2013, the Court cannot ignore the uncertainty of the witnesses' future
 16 willingness to travel. Moreover, MPS will not allow two important witnesses to travel
 17 to the United States to testify at trial. Because the witnesses are beyond the subpoena
 18 power of the United States, the Court finds that exceptional circumstances exist. The
 19 Court, therefore, GRANTS the government's motion for Rule 15 depositions.

2. Depositions Outside the United States without the Defendant Present

20 Rule 15 also governs the circumstances under which a witness may be deposed
 21 outside the United States without the defendant's presence. Under Rule 15(c)(3), a
 22 witness may be deposed outside of the United States without the defendant's presence if
 23 the Court finds

24 (A) the witness's testimony could provide substantial proof of a material fact
 25 in a felony case;

1 (B) there is a substantial likelihood that the witness's attendance at trial
2 cannot be obtained;
3 (C) the witness's presence for a deposition in the United States cannot be
4 obtained;
5 (D) the defendant cannot be present because:
6 (I) the country where the witness is located will not permit the
7 defendant to attend the deposition;
8 (ii) for an in-custody defendant, secure transportation and continuing
9 custody cannot be assured at the witness's location. . . and
10 (E) the defendant can meaningfully participate in the deposition through
11 reasonable means.

12 Fed. R. Crim. P. 15(c)(3).

13 The Court finds that the conditions for deposing a witness outside of the United
14 States without the defendant's presence are satisfied. First, the government has
15 established that the testimony of the witnesses could provide substantial proof of
16 material facts in the case against defendant. For example, defendant's nephew and the
17 MPS undercover agent could provide evidence that shows that defendant gave specific
18 instructions to his nephew regarding the details of the murders. Both witnesses could
19 testify that defendant's nephew showed the MPS undercover agent where defendant's
20 wife's relatives lived so he would know where to find the targets. Similarly, the family
21 members and friends identified by the government could provide testimony that
22 confirms information defendant and his nephew gave the undercover agents.

23 Second, as explained earlier, all of the witnesses are beyond the subpoena power
24 of the United States. Thus, there is a substantial likelihood that their presence at trial
25 cannot be obtained. Third, for reasons similar to those preventing the witnesses from
26 testifying at trial, the Court finds that the witnesses' presence for depositions in the
United States cannot be obtained. Finally, the Court finds that defendant cannot be
present at the deposition, but can meaningfully participate from Seattle. Defendant is
currently in federal custody and federal marshalls cannot assure continuing custody of
the defendant throughout the stay in Vietnam. Defendant, however, will be able to

1 participate in the depositions through the use of a video-conferencing system in the U.S.
2 Attorney's Office while one of defendant's lawyers is physically present at the
3 depositions in Vietnam.

4 Defendant argues that the government has not satisfied Rule 15(c)'s requirements
5 for conducting a deposition in a foreign country without the defendant present in light of
6 Rule 15's strong preference for face-to-face confrontation. Dkt. # 48 at 7-8. The Ninth
7 Circuit has held that "before the 'Confrontation Clause's preference for face-to-face
8 confrontation' may be avoided by resort to telephonic participation, the Government
9 'must first attempt to secure the defendant's actual, physical presence at the
10 deposition.' " United States v. Medjuck, 156 F.3d 916, 920 (9th Cir. 1998) (quoting
11 Christian v. Rhode, 41 F.3d 461, 467 & n.8 (9th Cir. 1994)) (emphasis in original). In
12 Medjuck, the Ninth Circuit determined that the government satisfied that requirement
13 "by virtue of its demonstration of the impossibility of obtaining Medjuck's physical
14 presence on terms acceptable to the government." Id. at 920. "There is no requirement
15 that the Government go through a futile exercise before it may proceed to arrange for a
16 defendant's remote participation." Id. The court upheld the district court's admission
17 of videotaped testimony from three Canadian witnesses where the defendant was able to
participate in the depositions via a live video feed. Medjuck, 156 F.3d at 919-21.

18 Here, like in Medjuck, the government's showing that it cannot secure
19 defendant's physical presence at the depositions and its proposal that defendant
20 participate in the depositions via a live video feed meet the Ninth Circuit's
21 requirements. Defendant and the witnesses will be able to see each other during the
22 depositions. The Court, therefore, GRANTS the government's motion to take
23 depositions in Vietnam without defendant's physical presence. Pursuant to Rule 15(d),
24 the government is hereby ordered to pay reasonable travel expenses of one of
25 defendant's attorneys to attend the depositions in Vietnam.

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1 The government also requests that the Court permit the use of some or all of the
2 depositions at trial. Dkt. # 47 at 12. The Court finds this request premature as the Court
3 will be better suited to consider the totality of the circumstances, such as the Zuno-Arce
4 factors, closer to trial. See Fed. R. Crim. P. 15(f) (“An order authorizing a deposition to
5 be taken under this rule does not determine its admissibility.”). The Court will also be
6 considering whether defense counsel had sufficient time for and access to discovery
prior to the depositions.

III. CONCLUSION

For all of the foregoing reasons, the government's motion for Rule 15 depositions (Dkt. # 47) is GRANTED.

DATED this 31st day of May, 2013.

Robert S. Lasnik
Robert S. Lasnik
United States District Judge